

*Per Curiam.** If the boards had been the property of Gustus, it is admitted that the attachment would have constituted a valid lien upon them, and that they would have been in the constructive possession of the officer. G. L., c. 224, s. 16. But the question of title did not affect his possession of the property, and unless he afterwards parted with that possession, he cannot justify his act as against the true owner. When he informed the plaintiff that he had not attached the plaintiff's boards, but had attached all boards belonging to Gustus, and that the plaintiff could take the boards away if they belonged to him, both parties understood that the attachment was not released, and that the plaintiff would take them at his peril. The permission given him to take them was contingent, depending upon the question of title, which the officer did not attempt to decide. He retained the same possession of the boards after this conversation that he had before. He still had the plaintiff's property without right.

Exception sustained: judgment for the plaintiff.

CLARK, J., did not sit: the others concurred.

CHASE *v.* WILLARD.

A technical breach of warranty of title to chattels, resulting in no appreciable damage to the vendee, does not give him the right to rescind the contract.

TROVER, for \$175 in bank bills. Facts found by the court. The defendant sold and delivered to the plaintiff certain chattels, "warranted free from any incumbrance," for \$175, which was paid in bank bills. The chattels were subject to a mortgage to McKean, who verbally authorized the defendant to make the sale. The plaintiff did not learn of the mortgage till some time later, when, claiming the right to rescind the sale on that account, he tendered the chattels to the defendant and demanded the bills.

George B. French, for the plaintiff.

William W. Bailey, for the defendant.

*Per Curiam.** The plaintiff has suffered no practical damage by the alleged breach of the warranty of title. It was his intention to receive, and the defendant's intention to convey to him, an

* See foot-note on page 80.

absolute title to the chattels. The written warranty that they were "free from any incumbrance" means that the title conveyed should be absolute in the vendee. Whether the vendor had in fact the entire right of disposing of the chattels is immaterial, for by the sale that right passed to the plaintiff. The statute (G. L., c. 137, s. 13) prohibiting the mortgagor from selling the mortgaged property without the consent of the mortgagee in writing upon the mortgage did not prevent the title from passing. *Gage v. Whittier*, 17 N. H. 312; *Patrick v. Meserve*, 18 N. H. 300; *Roberts v. Crawford*, 54 N. H. 532; *Bank v. Raymond*, 57 N. H. 144. If the defendant had not the right of selling the property to every one, he had the right of selling it to the plaintiff free from any incumbrance; and the plaintiff having received the title he contracted for, cannot now rescind the contract on the ground that the defendant had not the right to sell the property generally, or to dispose of it in all ways as the absolute owner of it. It is not understood that a technical breach of a contract of warranty in an immaterial respect, resulting in no appreciable damage to the vendee, authorizes him to repudiate the contract and exercise the remedial power of rescission. 2 Kent Com. 475, 476; 2 Sch. Per. Prop., s. 597; *Stoddart v. Smith*, 5 Binn. 355, 363; *Case v. Hall*, 24 Wend. 102; *Flight v. Booth*, 1 Bing. N. C. 370, 377. Whether assumpsit for nominal damages or an action for a breach of the warranty could be maintained we need not inquire. It would be inequitable to allow an amendment to be made for the purpose of raising either of those questions.

Judgment for the defendant.

CARPENTER, J., did not sit: the others concurred.

LINEN v. MAXWELL.

Claim of title to land, unaccompanied by possession, cannot give title by prescription.

TROVER, for ice cut and carried away by the defendant, in February, 1890, from the mill-pond formed by a dam across Black brook. The plaintiff owns the land covered by the south part of the pond, subject to the defendant's right of flowage, unless the defendant has acquired title to it by adverse possession. The facts sufficiently appear in the opinion. A verdict was ordered for the plaintiff, and the defendant excepted.

Burnham, Brown & Warren, for the plaintiff.

Sulloway & Topliff, for the defendant.